Supreme Court, U.S.
FILED
DEC 21 1992
OFFICE OF THE CLERK

No. 92-923

IN THE

Supreme Court of the United States

October Term, 1992

STEPHEN M. GALLAGHER and KEVIN MOUSER, individually and as representatives of all other individuals similarly situated,

Petitioners,

v.

INDIANA STATE ELECTION BOARD; ALAN MILLS, JOSEPH DONNELLY; and DONALD COX, in their official capacities as members of the INDIANA STATE ELECTION BOARD; MARION COUNTY ELECTION BOARD; MARION COUNTY BOARD OF VOTER REGISTRATION,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Indiana

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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15 pp

QUESTION PRESENTED FOR REVIEW

Whether the sections of the Indiana Code, IC §§ 3-7-3-6, 3-7-8-2, and 3-11-8-2, that limit the franchise of an otherwise qualified voter who moves to a new precinct within thirty (30) days of an election to voting for only the President and Vice President, violate the Equal Protection Clause of the Fourteenth Amendment.

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Indiana State Election Board, and its members in their official capacities, pursuant to Rule 15 of the Rules of this Court, respectfully oppose the petition for a writ of certiorari to review the decision of the Supreme Court of Indiana in the case of *Gallagher v. Indiana State Election Board*, Ind., 598 N.E.2d 510 (1992).

STATEMENT OF THE CASE

The basic facts of this case are set forth in the Indiana Supreme Court's decision, *Gallagher v. Indiana State Election*

Board, Ind., 598 N.E.2d 510 (1992). (Pet. App. A-1 *et* .). Respondents herein respectfully note that Petitioners' reliance on the numbers of persons affected by this class action (Petition for Writ of Certiorari pp. 13-14) was not a factual finding of any court below.

SUMMARY OF THE ARGUMENT

This case is inappropriate for review by this Court because:

A. Petitioners do not have a fundamental right to vote in a precinct in which they do not reside.

B. The distinctions drawn by the Indiana statutes are rationally related to legitimate state interests.

A. PETITIONERS DO NOT HAVE A FUNDAMENTAL RIGHT TO VOTE IN A PRECINCT IN WHICH THEY DO NOT RESIDE

Not every statute in a voting system is subject to strict scrutiny under the Equal Protection Clause. *Burdick v. Takushi*, 540 U.S. ____, 119 L.E.2d 245 (1992). Indiana's statutes dealing with voters who move *within* its thirty (30) day durational residency requirement are classic examples of reasonable restrictions to further important state regulatory interests.

Petitioners' entire argument is based upon the assertion that Gallagher and Mouser have a fundamental right to vote in the precinct in which they were registered, even though they moved out of the precinct and were no longer residents of the precinct at the time of the election. This Court has held that a person has no constitutionally-protected right to vote in a place where he is not a resident.

In *Katzenbach v. Morgan*, 384 U.S. 641 (1966), the United States Supreme Court acknowledged that:

> Under the distribution of powers effected by the Constitution, the States establish qualifications for voting for state

> officers, and the qualifications established by the States for voting for members of the most numerous branch of the state legislature also determines who may vote for United States Representatives and Senators, Art . I, § 2; Seventeenth Amendment; *Ex parte Yarbrough*, 110 U.S. 651, 663, 4 S.Ct. 152, 28 L. Ed . 274 .

Id., 384 U.S. at 647 . The federal courts have thus acknowledged that a State's election qualifications affect federal elections, to the extent that voters are electing federal Congressional representatives.

The United States Supreme Court has *repeatedly* affirmed that a State has the power to require voters to be bona fide residents of relevant political subdivisions. *Holt Civic Club v. City of Tuscaloosa,* 439 U.S. 60 (1978); *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Carrington v. Rash*, 380 U.S. 89, 96 (1965) . The Indiana Court of Appeals and the Indiana Supreme Court properly found below that Indiana's Constitution requires an individual to be a resident of a precinct for a duration of at least thirty days continuously before an election in order to qualify as a bona fide resident of that precinct. Ind. Const. Art. 2 § 2. This requirement lies well within the powers granted to the States.

Congress, through the Supremacy Clause, U.S. Const. Art. 6, C1. 2, and 42 U.S.C. 1973aa-1, has mandated voter qualifications preempting state voter qualifications applicable only to the election of President and Vice-President. Indiana has recognized and given effect to the federal standards for Presidential and Vice-Presidential elections in IC § 3-7-4-1 *et seq.* In regard to voter qualifications in elections for all other federal, state and local offices, the states have authority to set voter qualifications. *Oregon v. Mitchell*, 400 U.S. 112 (1970).

The Supreme Court held in *Dunn v. Blumstein, supra*, held that "In sum, *durational* residence laws must be measured by a strict equal protection test[.]" Id. at 405 U.S. 342 (emphasis

added). As framed by the Court itself, *Dunn* dealt only with the durational aspect of a residency requirement.

> The subject of this lawsuit is the durational residence requirement. Appellee does not challenge Tennessee's power to restrict the vote to bona fide Tennessee residents. Nor has Tennessee ever disputed that appellee was a bona fide resident of the State and county when he attempted to register. But Tennessee insists that, in addition to *being* a resident, a would-be voter must *have been* a resident for a year in the State and three months in the county. It is this additional *durational* residence requirement that appellee challenges.

Id. 405 U.S. at 334 (emphasis supplied by the Court).

In the present case, the length of the residency requirement is immaterial. The length of the residency requirement only becomes material when a person actually resides within a precinct at the time of the election. In that case, the length of the residency becomes material to determine whether the resident meets the durational requirement in order to be eligible to vote. However, the present case deals only with the treatment of different groups of people, all of whom are, in fact, *non-residents* of the precinct. Gallagher and Mouser were clearly not residents of the precincts in which they assert their right to vote at the time of the election. It is the very fact of residency, or lack thereof, not the length of residency, that is the disqualifying factor at issue in this case.

Gallagher and Mouser in the case at bar do not challenge the durational aspect of Indiana's residency requirement. They are not asserting their right to vote in the precincts in which they were residents at the time of the election. (Appellants' Brief and Appendix, filed with the Indiana Court of Appeals, pages 40-41). Instead, Gallagher and Mouser assert a fundamental right to return to, and vote in, a precinct in which they no longer reside. Because Gallagher and Mouser, and the classes they represent,

lacked residency in their old precincts, they have no fundamental right to vote in that precinct. *Burdick, supra; Holt, supra.*

It is only when a State grants the right to vote to some bona fide residents while denying the franchise to other bona fide residents that strict scrutiny is invoked and the State must show that the distinctions or exclusions are necessary to promote a compelling state interest. *Kramer v. Union Free School District*, 394 U.S. 621, 627 (1969). Petitioners wish to extend the holding of *Kramer* to people who are not bona fide residents of the precinct in which they wish to vote.

The United States Supreme Court specifically rejected the argument that citizens have a fundamental right to vote in a precinct where they are not a resident in *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60 (1978). Holt was an unincorporated community located near Tuscaloosa, Alabama. Holt was within Tuscaloosa's police jurisdiction, and therefore subject to the city's police, sanitary and business licensing regulations, as well as the jurisdiction of the city criminal court. However, residents of Holt were not entitled to vote in municipal elections. The appellants claimed that they were denied due process and equal protection by Tuscaloosa's extraterritorial exercise of police powers over Holt residents, without the corresponding extension of the right to vote on an equal basis with people residing within the corporate limits of Tuscaloosa. *Id.* at 61-63. This Court rejected the appellants' claim, stating:

> No decision of this Court has extended the "one man, one vote" principle to individuals residing beyond the geographic confines of the governmental entity concerned, be it the State or its political subdivisions. On the contrary, our cases have uniformly recognized that a government unit may legitimately restrict the right to participate in its political processes to those who reside within its borders.

Id. at 69-70. The Court concluded that since non-residents had no right to vote in the municipal election, the State was not

required to extend the vote to the appellants merely because they were subject to municipal regulation.

Petitioners' argument is similarly unfounded. They assert that Indiana denies inter-county movers (subclass A) equal protection by allowing a voter who moves to a different precinct in the same county to transfer his registration and vote in his former precinct for all electoral offices and propositions, while denying the same privilege to a voter who moves to a different county. They further assert that Indiana denies intra-county movers who fail or refuse to apply for transfer of their registration (subclass B) equal protection by allowing a voter who moves to a different precinct in the same county *and* completes the affidavit prescribed in IC § 3-7-8-2(d) to vote at his former precinct, while denying the same privilege to a voter who moves to a different precinct in the same county but fails or refuses to complete the affidavit prescribed in IC § 3-7-8-2(d). The bottom line is that the members of both subclasses have *no* right to vote in precincts where they are not residents, so the State is not required to extend the vote to them merely because it extends the vote to other non-residents.

Petitioners' factual situations are strikingly similar to one reviewed by a United States District Court in *Snead v. City of Albuquerque*, D.N.M., 663 F.Supp. 1084 (1987). In *Snead*, Bernalillo County landowners located outside the corporate boundaries of the City of Albuquerque sought the right to vote in a municipal bond election. New Mexico law prohibited individuals in the non-resident voting division from voting in the municipal bond election unless they had paid tax on property located within the city corporate boundaries during the year preceding the election, and had registered with the municipal clerk their intention to vote in the municipal election. The non-resident, non-taxpaying plaintiffs argued that if New Mexico extended the vote to some county residents, then it must extend the right to all county residents unless the classification served a compelling state interest. The non-resident, taxpaying plaintiffs argued that the requirement of registering their intention

to vote and the procedures for that registration were unduly burdensome and served no compelling state interest. *Id.* at 1085. The court, citing *Holt Civic Club*, rejected plaintiffs' claims and concluded that:

> Because the Plaintiffs in this case have no constitutionally protected right to vote in the city's elections, the mere fact that the New Mexico law extends the right to vote to some non-residents does not implicate strict scrutiny by this Court of the provisions. In other words, to implicate the higher standard of review on the basis of a "fundamental right" requires that the right be guaranteed by the Constitution.

Id. at 1087. Applying the same reasoning here, the mere fact that the Indiana legislature has extended the right to vote to some people who are not residents of the precinct in which they vote, or has required some of those non-residents to comply with a simple procedure before voting in their former precinct of residence, does not implicate a higher level of scrutiny by the court Non-residents such as Gallagher and Mouser have no fundamental right to vote in precincts where they do not reside.

B. THE DISTINCTIONS DRAWN BY THE INDIANA STATUTES ARE RATIONALLY RELATED TO LEGITIMATE STATE REGULATORY INTERESTS

Once an equal protection issue is "stripped of its voting rights attire," the Court should examine the statutes in question to determine whether those statutes bear a rational relationship to a legitimate state purpose. *Holt Civic Club*, 439 U.S. at 70. The statute offends equal protection "only if the statute's classification rests on grounds wholly irrelevant to the achievement of the State's objective.'" *Id.* at 71, quoting *McGowan v. Maryland*, 366 U.S. 420, 425 (1965). *See also Burdick v. Takushi, supra.*

Since the Petitioners have no fundamental right to vote in precincts where they are not residents, the question becomes whether Indiana's requirement of precinct residency bears a rational relationship to a legitimate state purpose, and whether IC § 3-7-8-2 bears a rational relationship to a legitimate state purpose. Indiana's precinct residency requirement bears a rational relationship to the State's legitimate interest in preserving the precinct as the basic political community in Indiana. In fact, this interest has been characterized by the United States Supreme Court as a compelling state interest.

In *Dunn, supra*, the United States Supreme Court noted:

> An appropriately defined and uniformly applied requirement of bona fide residence may be necessary to preserve the basic conception of a political community, and therefore could withstand close constitutional scrutiny.

Id. at 343-44.

Indiana, through its Constitution and its statutes, has set up the precinct as the basic "political community" in this State. Ind. Const. Art. 2 § 2; IC § 3-11-1-1 *et seq*. Voters in each county are registered and vote according to the precinct in which they reside. IC §§ 3-7-1 et seq., IC § 3-11-1-1 et seq. Elections are conducted on the precinct level. IC § 3-11-8 *et seq*. Precinct boundaries are drawn to coincide with the boundaries of congressional and state legislative districts as well as city, township and county boundaries. IC § 3-11-1.5-4, (previously, IC § 3-11-1-2 (repealed)). Precincts are the basic, or fundamental, political communities in Indiana. The statutes, and the Indiana Constitution itself, requiring a person to be a resident of the precinct in which he votes are reasonably related to preserving the concept of the precinct as the basic, or fundamental, political community.

While it is true that congressional and legislative districts, as well as city, township, and county boundaries, each may

encompass several precincts, a person's congressional or legislative representative and his in municipal, township, and county elections, or any combination of the above, will depend on the precinct in which he resides. Because precinct lines do not cross congressional or legislative districts or city, township or county lines, when a person moves from one location to another *within* a precinct, his congressional and legislative districts and interest in local elections will not change. However, if a person moves outside his old precinct, his congressional and legislative districts as well as his interest in local elections may also change. In such a case, a person moving outside the precinct may lose any legitimate interest he may have had in voting for congressional or legislative representatives or for local offices in his old precinct.

A move outside a particular precinct may change any combination of legislative, executive or judicial offices or elections that a person has an interest in and therefore, should be entitled to vote for. A move from a precinct inside a city limits to a precinct outside the city limits may not change a person's congressional or legislative district but would remove any interest that person would have in voting for a municipal office. Likewise, a move to a precinct in another township or county would remove any interest a person would have in elections for township or county office. A move to another county may change the persons congressional or legislative districts. The determination of which of the above mentioned offices and elections a person has a legitimate interest in depends upon the precinct in which he resides. To allow persons who have moved out of the precincts, and thereby changed the make-up of their respective representatives, to vote in their old precinct where they no longer have any legitimate interest in the elections would unfairly dilute the votes of the residents who remain and retain a legitimate interest in the elections. Indiana's precinct residency requirement is rationally related to the state's legitimate interest in preserving the integrity of the precinct as the state's basic political community.

It may be possible for Indiana to devise an election method which would preserve the integrity of the precinct while still preserving a voters franchise in state-wide offices and issues. However, as long as a state has chosen a method which is constitutionally acceptable, the question of whether the state has chosen the soundest, most practical, or more preferable alternative for internal government is irrelevant. *Holt Civic Club*, 439 U.S. at 73-74. In *Holt*, then Justice Rehnquist specifically stated:

> From a political science standpoint, appellants' suggestion may be sound, but this Court does not sit to determine whether Alabama has chosen the soundest or most practical form of internal government possible. Authority to make those judgments resides in the state legislature and Alabama citizens are free to urge their proposals to that body. *See, e.g.. Hunter v. Pittsburgh*, 207 U.S. at 179, 28 S.Ct. at 46. Our inquiry is limited to the question whether 'any state of facts reasonably may be conceived to justify' Alabama's system of police jurisdiction, *Salyer Land Co. v. Tulane Lake Basin Water Storage Dist.*, 410 U.S. at 732, 93 S.Ct. at 1231[.]

Id. 439 U.S. at 73-74. Indiana's precinct residency requirement is constitutional as a pure residency requirement and is rationally related to a legitimate state interest in preserving the precinct as the basic political community in the State.

Indiana did, and still does, allow some people who have moved from the precinct in which they were registered within thirty (30) days of an election, to return to their old precinct and vote without limitation. IC § 3-7-8-2. If a person moves from one precinct to another, within the same county, within thirty (30) days of an election, and goes to the circuit court clerk or board of voter registration in their county, on or before 4:00 p.m. the

Friday before the election,[1] he can execute an affidavit and transfer his registration to their new precinct. The person is then allowed to return to his old precinct to vote without limitation. IC § 3-7-8-2(c).

By following *Holt*, the State could simply refuse to permit all people who had moved within the same county to vote at their old precincts (except for President and Vice President, when applicable). As noted by the trial court in this case, the statute permitting these people to vote, IC § 3-7-8-2, may be of doubtful constitutional validity under Article 2 § 2 of the Indiana Constitution. (R. at 295-296). *See, Board of Election Comm'rs v. Knight*, 187 Ind. 108, 117 N.E. 565 (1917); *Morris v. Powell*, 125 Ind. 281, 25 N.E. 221 (1890). However, none of the parties to this case have any standing to challenge that aspect of the constitutionality of IC § 3-7-8-2 under the Indiana Constitution. *See, Callahan v. State*, 247 Ind. 350, 214 N.E.2d 648, 651 (1966) ("If the statute is unconstitutional, that fact alone avails a party nothing, unless as a result petitioner failed to get his constitutional right."); *Bagwell v. Chrysler Corporation*, Ind. App., 341 N.E.2d 799, 799 (1976) ("In order to challenge the constitutionality of a statute, a plaintiff must have suffered from its alleged constitutional infirmity.") (citing *Barrows v. Jackson*, 346 U.S. 249, 255 (1953) and *Storer v. Brown*, 415 U.S. 724, 736-37 (1974).

The Indiana General Assembly could have reasonably assumed that a move from one precinct to another, within the same county, was less likely to result in a voter changing congressional or legislative districts and would be somewhat less likely to remove the voters' legitimate interest in local elections. Therefore, providing a mechanism to allow voters moving to another precinct in the same county to vote in their old precincts would be less of an infringement on the integrity of the

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[1]The Friday deadline was in effect at the time relevant to this case. The statute has now been amended to move the deadline forward to 4:00 p.m. on the Monday immediately before the Tuesday election. IC § 3-7-8-2(c) (1).

precinct as a political community and would be less likely to dilute the votes of the remaining residents of the precinct.

Furthermore, the administrative procedure enabling such individuals to vote is entirely reasonable. In order to comply with the statute, individuals who move within the same county may vote at their former precincts of residence by executing an affidavit up until the Friday before the election (presently, the Monday before the election). Asking an individual to complete the appropriate forms is hardly an impermissible burden on his right to vote, especially when considered in light of the fact that the individual is seeking to vote in a precinct where he is not a bona fide resident. Again, the fact that other states may have found a more practical or more preferable procedure is irrelevant.

On the other hand, the Indiana General Assembly could have reasonably assumed that a voter who moves to a precinct in another county is more likely to change congressional or legislative districts and certainly would lose all legitimate interest in city, township and county elections in his old county of residence. Therefore, permitting voters who move to a different county to vote in their old precinct, which is now in a totally different county, would impinge on the integrity of the precinct and would dilute the votes of the remaining residents who retain a legitimate interest in the local elections.

Indiana's durational precinct residency requirement is constitutional as a pure residency requirement and is rationally related to a legitimate state interest in preserving the precinct as the basic political community in Indiana. The statutes that permit some non-residents to vote while denying the franchise, with the exception of elections for President and Vice President, to other non-residents is also reasonably related to the State's legitimate interest and does not violate the Equal Protection Clause.

CONCLUSION

For the foregoing reasons, Respondents respectfully urge that the petition for a writ of certiorari be denied.

Respectfully submitted,

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December 21, 1992